

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2051

To be argued by
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

ALICE CRIMMINS, :

Petitioner-Appellant, :

-against- :

HONORABLE HUGH CAREY, as Governor of the :
State of New York and HONORABLE EDYRS :
WOODROFFE, Superintendent, Parkside :
Correctional Facility, :

Respondents-Appellees. :

-----X

Appeal from the United States
District Court for the Eastern
District of New York

BRIEF FOR RESPONDENTS-APPELLEES

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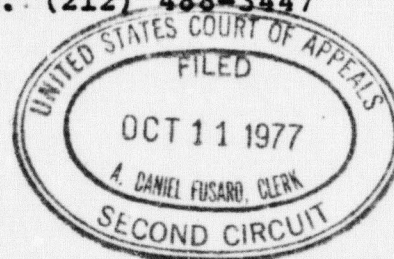


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Appeal from the United States
District Court for the Eastern
District of New York

BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Dooling, J.), entered December 10, 1976 denying, without a hearing, appellant's petition for a writ of habeas corpus. The District Court granted a certificate of probable cause on December 17, 1976.

Questions Presented

1. Was the alleged comment by the prosecutor on petitioner's failure to take the stand, even if error, harmless beyond a reasonable doubt?

2. Did the prosecution "suppress" any evidence? Assuming arguendo that he did, was it harmless error?

3. Did the murder indictment inflict any unconstitutional penalty on petitioner? In any event, is the question academic?

4. Was petitioner deprived of a fair trial by the prosecutor's alleged demonstration that her accomplice, a defense witness, had exercised his Fifth Amendment rights?

Statement of Facts

Procedural Background

Petitioner-appellant (hereinafter, "petitioner") challenges a conviction for manslaughter in the first degree in the death of her daughter Alice Marie in Supreme Court, Queens County, rendered after trial by jury (Balbach, J.) May 13, 1971. Petitioner was sentenced to an indeterminate term of five to twenty years. Petitioner was paroled on September 9, 1977.*

In the same trial at which petitioner sustained the conviction now challenged, she stood trial on a murder indictment in the death of her son. Petitioner was convicted by the same jury of murder in the first degree as to that indictment.

On appeal, the Appellate Division unanimously reversed petitioner's murder conviction, on the law and the facts, and ordered that count dismissed. The Appellate Division also reversed

* Petitioner's prior conviction of manslaughter for the death of her daughter was reversed and a new trial ordered because one or more of the jurors had taken independently a view of an area involved in the evidence. 33 A D 2d 793, 307 N.Y.S. 2d 81 (2d Dept., 1969), affd. 26 N Y 2d 319, 310 N.Y.S. 2d 300 (1970); Appendix, p. 23.

3 to 2, petitioner's manslaughter conviction, on the law, and a new trial was ordered. People v. Crimmins, 41 A D 2d 933, 343 N.Y.S. 2d 203 (2d Dept., 1973); Appendix, p. 26.

The New York Court of Appeals unanimously affirmed the Appellate Division with respect to the dismissal of the murder count as to the son's death. With respect to the Appellate Division's determination of the manslaughter conviction, the Court of Appeals reversed by a 5 to 2 vote and remitted to the Appellate Division for determination of the facts. People v. Crimmins, 36 N Y 2d 230, 367 N.Y.S. 2d 213 (1975); Appendix, p. 28.

On remittur, the Appellate Division affirmed 3 to 2 the conviction of manslaughter and order denying motion for a new trial. Two dissenting justices voted for a hearing on the motion for a new trial, but otherwise would have voted to affirm the manslaughter judgment. People v. Crimmins, 48 A D 2d 663, 367 N.Y.S. 2d 532 (2d Dept., 1973); Appendix, p. 65.

The Court of Appeals affirmed, with one dissent. 38 N Y 2d 407, 381 N.Y.S. 2d 1 (1975); Appendix, p. 43.

Petitioner then filed this federal writ.

In his decision of December 10, 1976, Appendix, p. 1, Judge Dooling dismissed the petition finding that (1) the subsequent indictment of petitioner for the murder of her son was

proper and not a reprisal for prosecuting the appeal from the prior judgment since it was based on a distinct and separately indictable offense; (2) "[e]liciting the fact that Colabella had declined to waive immunity when asked to do so -- if it occurred -- was not an invasion of petitioner's constitutional rights" (Appendix, p. 8) and "no damaging consequence is seen to have followed from the ill-advised questions and the uncertain and uninformative answers." (Appendix, p. 11); (3) any error committed by the prosecutor in his summation did not deprive petitioner of any constitutional right due to the curative effort of the trial judge, the total circumstances of the trial and the evidence, including petitioner's unsworn outbursts, and the absence of any motion for mistrial at the close of summation; (4) no admissible evidence was withheld from petitioner; the New York Court of Appeals properly determined that there had been no improper suppression of material and (5) the integrity of the trial was not improperly affected by publicity.

The Evidence of Petitioner's Guilt*

Petitioner claimed she fed her children manicotti, string beans, milk and soda at approximately 7:30 p.m., July 13, 1965 (Detective Piering, 483, 484).** Detective Piering said he

* An exhaustive 80 printed page summary of the trial testimony is set forth in the Brief of the District Attorney to the Appellate Division dated January, 1973. A 40 page summary is set forth in the District Attorney's Brief to the New York Court of Appeals dated April, 1974. The State briefs of the parties are provided to the Court herewith.

** References are to the witness. Page references are to the trial transcript, a copy of which is being supplied to the Court.

found a package of frozen manicotti in the garbage can and some uneaten manicotti in the refrigerator (512, 513).

Petitioner claimed she discovered her children were missing around 9 a.m., July 14, 1965 (Piering, 488). She had last seen her children at midnight (Piering, 486-487).

Petitioner told police that her children remained with her throughout the evening of July 13, 1965 (483-487), and that she was alone (530).

Between midnight, when petitioner says she last saw her children, and 9:00 a.m., July 14, 1965, when petitioner claims she noticed they were gone, petitioner took two walks outside with her dog, once as late as 3 a.m. (Piering, 487). Another witness, Robert Caffiero, testified that he lived directly across the mall from petitioner and was walking his dog at around 12:30 a.m. He observed petitioner walking her dog. Although he or his wife walked their dog almost every night of the week, this was the first time he had ever seen petitioner walking her dog at night (839, 840, 843-845, 849).

Petitioner told Piering on July 14, 1965, that she put her children to bed in clean underpants and tee-shirts (Piering, 485, 486). On August 2, 1965, she told Piering the same thing. She also stated that her daughter's pajama tops had been kept in a dresser drawer. At that time Piering had in his possession a

pajama top found on the girl's body (525-528).

August 2, 1965, was also the first time the defendant told police about her telephone conversation with Rorech at 11 p.m., July 13, 1965 (530-531).

Anthony Grace, an acquaintance of petitioner's, testified that petitioner called him at the Capri Bar at 11:00 p.m., July 13, 1965.* He claims that petitioner wanted him to take her out for a drink (780). According to Detective Piering, however, petitioner claimed she and Grace discussed her upcoming custody hearing on this occasion (486). This Grace denies (781, 782). Petitioner had called Grace earlier in the evening at around 7:30 p.m. (484).

According to Detective Piering, petitioner told him that she had taken some of her husband's old clothes out of the apartment on the morning of July 14, 1965. She did this as she left the apartment to look for her children. Her explanation was that she had collected the clothes the evening before during a house cleaning and when she left the morning of July 14 to look for her children "automatically" picked the clothes up and threw them in the car (488, 489, 503).

Dr. Richard Grimes of the Office of the Medical Examiner, who examined the girl's body at 2:45 p.m., July 14, 1965 said the minimum time the girl could have been dead was six to eight hours;

* Petitioner married Mr. Grace in 1977.

the maximum twenty-four hours (657-658).

Dr. Milton Halpern, the Medical Examiner, found that the stomach of the deceased contained recently ingested food and included a greenish vegetable and a light-colored material which appeared to be a form of pasta (1460-1462). A chemist testified to finding a green vegetable in the child's stomach which may have been string beans and macaroni (1408).

A medical report indicated the child had died within two hours after dinner (573), which according to petitioner occurred at 6:30 or 7:30 p.m., July 13, 1965 (1476).

The screen to the children's bedroom window was lying against the wall to the Crimmins' apartment. The petitioner claimed she removed the screen some time after 9:15 p.m., July 13, 1965, after she put the children to bed, because they had been throwing their toys through a hole in the screen (485-486). Petitioner said she intended to replace the screen with another screen, but the other screen turned out to be not usable. The first screen was accordingly "propped" back on the window without being fastened (293, 295, 485, 486, 487).

There was evidence, as a result of a simple police experiment, that it was difficult to remove the screen from outside the window (604, 605, 611-614).

There was evidence that an unmarked and unblemished film of dust covered the sill to the children's bedroom. Detective Meagher (990); Detective Piering (474-477); Sergeant O'Connor (687-688). There were no scuff marks or other indications evidencing entry through the window (990).

Petitioner told Detective Piering there had been a prowler in the area only two weeks before her children died (578).

Sophie Earomirski testified that at 2 a.m. on July 14, 1965, she looked out her window and saw a man and child coming out of the Mall. The woman was holding a blanket or bundle in her left arm and was holding a child by the hand. The man was walking five or six feet ahead of the woman. She heard the man say to the woman "come on, hurry up." The woman replied that the dog was pregnant and the man said, "Did you have to bring it?" (1086). The man then went over to the woman and took the bundle from her and "swung it under his arms." He carried it over to an automobile that was parked directly under Mrs. Earomirski's window and threw the bundle into the back seat. The woman ran over to the man and said, "My God, please don't do this to her." The man replied, "Does she know the difference now?" The woman then said, "Please don't say that; don't say that." The man then looked at the woman and said, "Now you're sorry" (1086-1087).

Mrs. Earomirski then started to close her window and

when it squeaked, the woman said, "Somebody's seen us."

The conversations which Mrs. Earomirski overheard occurred at a distance of some 200 feet.

Mrs. Earomirski identified the woman Alice Crimmins, whom she had seen before on several occasions (1292). At the mention of her name, there was an outburst from the defendant.

The automobile in question was parked near a "quite bright" lamp post (1101, 1106, 1107, 1136). The witness said she recognized the defendant under the lamp post as soon as she saw her (1319).

Sophie Earomirski was subjected to lengthy and skillful cross-examination. She was asked, inter alia, about her alleged tardiness in coming forward with her full story and her alleged hospitalization for an overdose of Librium.

The testimony of Sophie Earomirski was corroborated by the testimony of one Mrs. Tina DeVita. The witness testified that at 1:45 a.m., July 14, 1965, at 150th Street near the intersection of 72nd Drive, she saw a man, woman, boy and dog walking in the "mall." She did not know who the persons were. She said nothing about the incident for years because she was scared, and told a detective on July 16, 1965, that she had seen or heard nothing (2470-2471).

Joseph Rorech testified that he dated petitioner from January, 1964 to June, 1965. The relationship resumed January, 1966, and continued to approximately May, 1968 (1535-1539).

On July 13, 1965, at 11:00 p.m., Rorech said he called petitioner on the telephone. Petitioner told him to call back at 2:00 a.m. Rorech called petitioner at 2 o'clock in the morning, July 14, 1965. There was no answer (1554-1556).

At 10:30 a.m., July 14, 1965, Rorech called petitioner again. Petitioner told him her children had disappeared between 9 p.m. the night before and 9 o'clock in the morning (1558-1559).

In March 1966, petitioner and Rorech were discussing the case. Rorech suggested that someone had enticed the children out of the window. Petitioner replied with a gasp, "No, they went out the front door" (1561).

In June 1966, Rorech told petitioner that he had thought about coming over to her house the night of July 13, 1965. Petitioner replied: "'Oh, my God, Joe, I wish you had.' Rorech said, 'You mean if I had come over this wouldn't have happened?' and Alice said, 'Yes' (1562). Rorech 'kept saying 'I wish I had come over and this wouldn't have happened.' Later, Rorech said, 'I called you back at 2:00 in the morning but I got no answer. I wanted to come over at that time too'. Alice said, 'No, no'.

Rorech said, 'You mean it was too late?' and Alice said 'Yes'" (1563).

In September 1966, petitioner was reading a newspaper story concerning the arrest of "thirteen top hoods" in a Queens restaurant. Suddenly petitioner began to repeat a name over and over (1566-1567).^{*} Petitioner soon began to cry. Petitioner said: "'There was no reason for them to be killed, the reason had been eliminated'. Rorech said, 'You mean Evelyn?' and Alice replied 'Yes'. She then began repeating 'they are angels in heaven'. Rorech said, 'Alice, the children are dead, Eddie and Missy are dead, no one can speak for them. They can't speak for themselves; only you and I can help them now.' To which Alice just repeated, 'They are angels in heaven' (1570-1571).

Rorech then said, 'Why do you let people point a finger at you?' which he repeated several times to her. Alice said, 'What can I do?' and then added, 'They will understand. They know it was for the best.' She repeated this over and over. Rorech said to her, 'Who killed the children?' Alice continued to cry and repeat, 'They will understand, they will know it was for the best' and then said, 'Joseph forgive me, I killed her.' By this time, Alice was crying quite hard and Rorech also was crying. Alice then said, 'I didn't want him killed.' She then repeated over and over that 'the children would understand'.

^{*} The name of the person was not revealed, following a sidebar.

Petitioner then said, 'I agreed'" (1572).

Petitioner once told Rorech that she had considered taking her husband to look for the body of her son but decided against this because she had "caused Eddie enough trouble." She commented on the inability of the police to find the body by stating, "It was so easy" (1564).

In the spring of 1968, petitioner showed Rorech pictures of a man. Upon Rorech's inquiry, petitioner said it was "Vinnie Colabella", "the man that was with me that night" (1582).

Rorech was subjected to a lengthy and skillful cross-examination.

Petitioner's absence from her apartment after 2 a.m., July 14, 1965, is evidenced apart from Rorech's unanswered call at 2 a.m. by the testimony of a milkman, one Paul Schiralli, who regular delivered milk in petitioner's building. On the night in question, he heard no bark from petitioner's dog, an unusual event, a phenomenon which the witness reported to the police. Schiralli could not remember any other night when he did not hear the dog bark as he passed (910-945). Another witness testified that the dog would bark at any little noise (969).

Anthony Lombardino testified that he was presently Chief of the Criminal Division of the U.S. Attorney's office and a

former assistant district attorney in Queens County. He stated that in March 1968, one Vincent Colabella, told him while incarcerated at the Federal West Street jail that if it came to pass that he became involved in the case he would take the stand and testify that when he arrived at the house in Queens both children were dead (2905). Colabella denied this and any involvement in the crime (2722, 2723, 3040).

The State Appeals

On appeal from petitioner's conviction and the denial of her motion for a new trial, the Appellate Division reversed the murder count on the facts and the law and reversed the Manslaughter conviction on the law. 41 A D 2d 933; Appendix, p. 26.

The Court of Appeals in turn reinstated the manslaughter conviction and remanded the matter to the Appellate Division for a finding of fact, 36 N Y 2d 230 (1975); Appendix, p. 28. The Court found, inter alia, that the prosecutor's comment during the summation was harmless error and that "there is no reasonable possibility that the error might have contributed to defendant's conviction." The Court further found:

"The right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right. There is no predicate here, however for any claim that this defendant on her second trial was deprived of any such basic right." (Appendix, p. 30)

The Court also held that assuming arguendo that the prosecutor's cross-examination of Colabella was error, it was not of constitutional dimension, that "there was overwhelming proof that this defendant was guilty of manslaughter in the death of her daughter," (Appendix, p. 34), and that under State law, such error was harmless.

On remand, the Appellate Division affirmed the manslaughter conviction, 48 A D 2d 663; Appendix, p. 65.

The Court of Appeals, in affirming the manslaughter conviction, 38 N Y 2d 407; Appendix, p. 43, stated:

"We read this record as leading only to a single, inexorable conclusion, as two juries have indeed found: defendant was criminally responsible for the death of her daughter." (Appendix, p. 45)

The entire Court found that the trial court properly denied a hearing with respect to the Roe affidavit and that petitioner had presented no evidence sufficient "to ground an inference of improper suppression of evidence by the prosecution" (Appendix, p. 53).

The Principles of Federal Habeas Corpus Review

Petitioner's arguments must be considered in light of the basic principles governing federal collateral review of state court convictions.

A. A federal habeas court does not sit as a court of ordinary appellate review, but rather sits to canvass only fundamental constitutional error. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Cupp v. Naughten, 414 U.S. 141 (1973); Milton v. Wainwright, 407 U.S. 371 (1972); Schaefer v. Leone, 443 F. 2d 182, 185 (2d Cir., 1971).

B. The sufficiency of evidence to support a conviction is not cognizable in federal habeas review unless there is no evidence of guilt. Thompson v. Louisville, 362 U.S. 199 (1960); United States ex rel. Terry v. Henderson, 462 F. 2d 1125, 1131 (2d Cir., 1972).

C. Claims of prosecutorial misconduct and error are not cognizable in federal habeas review unless so egregious as to deprive the defendant of a fair trial. Donnelly v. DeChristoforo, *supra*; United States ex rel. Young v. Follette, 308 F. Supp. 670 (S.D.N.Y., 1970); United States ex rel. Birch v. Fay, 190 F. Supp. 105 (S.D.N.Y., 1961).

D. A defendant is entitled to a fair trial but not a perfect one. Lutwak v. United States, 344 U.S. 604, 619 (1953); Bruton v. United States, 391 U.S. 123, 135 (1968); United States v. Jackson, 542 F. 2d 403 (7th Cir., 1976) (quoting Judge, not Justice, Stevens' dissent in United States v. Thomas, 463 F. 2d 1061, 1066 (7th Cir., 1972): "Almost every jury trial requires some compromise

with standards of absolute perfection; such deviations must be tolerated if the jury system as to function effectively.").

E. Federal courts on habeas review do not sit to decide questions of state law. Schaefer v. Leone, supra; United States ex rel. Stanbridge v. Zelker, 514 F. 2d 45, 50 (2d Cir., 1975); United States ex rel. McNerlin v. Denno, 214 F. Supp. 480, 484 (S.D.N.Y., 1963). See also Brady v. Maryland, 373 U.S. 83, 90 (1963); England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 415 (1964).

F. Federal courts can reverse only for denial of specific constitutional rights (unless on the record as a whole there has not been a fundamentally fair trial) Donnelly v. DeChristoforo, supra, at 643; Cupp v. Naughten, supra.

G. The federal-state relationship is subject to considerable stress whenever a federal court is asked to review a state court conviction; any intrusion should be confined to those absolutely necessary. United States ex rel. Cleveland v. Casscles, 479 F. 2d 15, 19 (2d Cir., 1973).

H. Procedural defaults in state court proceedings may bar federal habeas review. Wainwright v. Sykes, ___ U.S. ___, 45 U.S.L.W. 1807 (June 23, 1977); United States ex rel. Tarullo v. LaVallee, 433 F. 2d 4 (2d Cir., 1970); United States ex rel. Schaedel v. Follette, 447 F. 2d 1297 (2d Cir., 1971); United

States ex rel. Satz v. Mancusi, 414 F. 2d 90 (2d Cir., 1969).

I. Federal courts on federal habeas review may not review discretionary rulings of state courts. United States ex rel. Brown v. LaVallee, 424 F. 2d 457, 458 n. 2 (2d Cir., 1970), cert. den. 401 U.S. 942 (1971) and cases cited therein.

J. Whether newly discovered evidence warrants a new trial is a question of discretion for the trial court and is not subject to federal habeas review. United States ex rel. Conomos v. LaVallee, 363 F. Supp. 994, 1005 (S.D.N.Y., 1973); Lewis v. Cardwell, 354 F. Supp. 26 (S.D. Ohio, 1972), affd. 475 F. 2d 467 (6th Cir., 1973), reversed on other grounds 94 S. Ct. 2464.

K. Alleged errors in state law and trial errors or irregularities occurring in a state court conviction are not subject to review by a federal court. Buchalter v. New York, 319 U.S. 427 (1943); Schaefer v. Leone, supra; United States ex rel. Birch, supra; United States ex rel. Sadowy v. Fay, 284 F. 2d 460 (2d Cir., 1960).

POINT I

THE ALLEGED COMMENT BY THE PROSECUTOR
ON PETITIONER'S FAILURE TO TAKE THE
STAND WAS, EVEN IF ERROR, HARMLESS
ERROR BEYOND A REASONABLE DOUBT.

Petitioner's claim that the prosecutor committed reversible error in commenting on her right to remain silent during his summation with the comments "Well, she doesn't have the courage to stand up here and tell the world she killed her daughter" (3261) and "(s)he doesn't have the courage to stand up and tell the world she killed her daughter" (3261-3262), as well as certain comments on petitioner's alleged desire to talk to her lawyers is without merit.

In its brief in the State Court of Appeals the Queens District Attorney admitted that the prosecutor's comment, taken in isolation, was improper. However, the Queens District Attorney argued that the remarks were taken out of context, and in context were part of a characterization of a statement made by petitioner to one Detective Kelly to a similar effect: "You mean by the truth, you want me to stand up and tell the whole world I killed my daughter?". In addition, the Queens District Attorney argued that in his summation the defense counsel attempted to bring in petitioner's supposedly exculpatory testimony in the Grand Jury into the jury room and offered an explanation of petitioner's statement; and petitioner testified without cross-examination by

her exculpatory outbursts. All the above factors were argued to render the prosecutor's comment as proper comment on evidence or harmless error in a confusing colloquy. See District Attorney's Appellate Division Brief, dated January 1975, pp. 146-151.

The meaning of the prosecutor's remarks must be considered against the manifest intent of the language or whether the jury would "naturally and necessarily take it to be a comment on the failure of the accused to testify." United States v. Dansker, 537 F. 2d 40, 63 (3rd Cir., 1976); Lussier v. Gunter, 552 F. 2d 585 (1st Cir., 1977) and cases cited at 389; United States v. Brown, 546 F. 2d 166 (5th Cir., 1977).

Certainly, if the prosecutor had intended to argue that the petitioner curiously had not taken the stand, he would have added a negative and asked why "she doesn't have the courage to stand up here and tell the world she [didn't] kill . . . her daughter."

The Court should not lightly infer that a prosecutor's comment meant the most damaging meaning or that the jury lighted on the most damaging interpretation. Ketchum v. Ward, 422 F. Supp. 934 (W.D.N.Y., 1976). Surely these were not the comments that swayed the jury, see Haberstroh v. Montanye, 493 F. 2d 483 (2d Cir., 1974).

Although the Appellate Division, 41 A D 2d 933 and the

State Court of Appeals, 36 N Y 2d 230, 237, found the prosecutor had committed constitutional error, the State Court of Appeals found the error to be harmless under the Chapman* test in view of the unsworn outbursts by the defendant, the comments of defense counsel and reactions in the courtroom at the time, the explicit curative instructions of the trial court, and the overwhelming proof of petitioner's guilt.

These conclusions were correct.

The proof of guilt was in fact overwhelming.

The outbursts of the petitioner in effect made her an unsworn witness in her own behalf not subject to cross-examination. This was properly weighed against the prosecutor's alleged error. Provocation may excuse otherwise improper statements. See United States v. Stassi, 544 F. 2d 579 (2d Cir., 1976), cert. den. 97 S. Ct. 1176, 1177 (1977); United States ex rel. Leak v. Follette, 418 F. 2d 1266 (2d Cir., 1969), cert. den. 397 U.S. 1050 (1970).

The trial court gave explicit curative instruction in its charge to the jury:

"No defendant in a criminal case is compelled to take the witness stand. By the plea of 'not guilty', which this defendant interposed to the indictment, the defendant denied the charges against her and put into issue every material allegation of the in-

* Chapman v. California, 386 U.S. 18 (1967).

dictment. Thereupon, the burden was placed upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt.

The fact that this defendant did not take the stand in her own defense may not be considered by you as any admission of her guilt, or as any evidence, directly or indirectly raising an inference, that she is guilty, because under the law, as I have explained to you, every defendant is presumed to be innocent. In fact, the law specifically provides that a defendant may testify as a witness in his own behalf, but the neglect or refusal of a defendant to testify does not create any presumption against her."

It is well settled that a prosecutor's comment on a defendant's failure to take the stand or silence can be cured with a complete and prompt instruction. United States v. McCarthy, 473 F. 2d 300 (2d Cir., 1972); United States ex rel. Cummings v. Zelker, 329 F. Supp. 4, affd. 455 F. 2d 714 (2d Cir., 1972), cert. den. 406 U.S. 927; United States v. Weisman, 366 F. 2d 767 (2d Cir., 1966); United States v. Biondo, 483 F. 2d 636 (8th Cir., 1973), cert. den. 94 S. Ct. 1468; United States v. Aldridge, 484 F. 2d 655, cert. den. 94 S. Ct. 1423 (7th Cir., 1973); United States v. Altavilla, 419 F. 2d 815 (9th Cir., 1969); United States v. Bruzgo, 373 F. 2d 383 (3rd Cir., 1967). This is also true under New York law. People v. Wheeler, 40 A D 2d 348 (2d Dept., 1973).

The Supreme Court of the United States has recently

emphasized the importance of curative instructions in assessing the impact of improper prosecutorial remarks. Donnelly v. DeChristoforo, supra. The defense must request the curative instructions. United States ex rel. Leak v. Follette, supra.

Whether a charge can be deemed corrective necessarily turns on the facts of each case and the "quality and forcefulness of the corrective charge," United States v. Semensohn, 421 F. 2d 1206, 1208 (2d Cir., 1976). Here it is clear that the corrective charges were curative. The court forcefully told the jury that her failure to take the stand could not be held against her.

It should be noted that the trial court also explicitly and forcefully stated in its charge that the statements, opinions and summations of counsel were not evidence, and that the only evidence in the case was what came from the witness stand (3386-3397). The trial court also told prospective jurors that an accused was not required to take the stand (196a-197a).

It should be noted defense counsel failed to make a motion for mistrial at the close of the prosecutor's summation. State law suggests that there must be both objection to alleged inflammatory summation and a motion for mistrial. People v. Wood, 12 N Y 2d 69, 78 (1962); People v. Broady, 5 N Y 2d 500, 514 (1959).

Donnelly v. DeChristoforo, supra, reaffirmed and re-

stated the well-settled principle that allegedly improper remarks by prosecutors are not cognizable in federal habeas review unless they were so egregious as to deprive an accused of a fundamentally fair trial. If petitioner assumes ordinary standards of appellate review are applicable here, she is in error. Donnelly v. DeChristoforo specifically so states.

The Supreme Court in Donnelly v. DeChristoforo said (at 647-648):

"The result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious conduct held in Miller* and Brady** . . . to amount to a denial of constitutional due process. . . we believe that distinction should continue to be observed. . ."

In the same opinion, the Supreme Court took as "important" the principle that federal habeas review was the narrow review of due process, not the broad review of supervisory power as though the state court were its own trial court. The Court also noted that federal habeas review focused primarily on specific guarantees of the Bill of Rights rather than on generalized claims of denial of due process. Donnelly v. DeChristoforo, at 642-643.

* Miller v. Pate, 386 U.S. 1 (1967).

** Brady v. Maryland, 373 U.S. 83 (1963).

The Donnelly v. DeChristoforo principles have long been applied in this Circuit to sustain state court convictions where the prosecutorial remarks were similar to or worse than those alleged in this case.

In other federal habeas cases where there has been an alleged comment on the defendant's failure to testify by the prosecution, this Circuit and its lower courts have found harmless error where there was present, as here, strong proof of guilt and curative instructions. United States ex rel. Satz v. Mancusi, 414 F. 2d 90, 92 (2d Cir., 1969); United States ex rel. Young v. Follette, 308 F. Supp. 670 (S.D.N.Y., 1970); United States ex rel. Flynn v. Butler, 397 F. Supp. 999 (S.D.N.Y., 1975), cert. prob. cause den. ____ F. 2d ____ (2d Cir. 10/8/75), cert. den. ____ U.S. ____ (2/23/76).

The federal courts in this Circuit have also sustained state court convictions despite other types of serious errors in prosecutorial remarks. United States ex rel. Young v. Follette, supra (prosecutor's suggestion to jury that accused had committed crime more heinous than his admissible prior record would indicate [as well as use of petitioner's silence to impeach his credibility] held not to require reversal); United States ex rel. Johnson v. Zelker, 339 F. Supp. 227 (S.D.N.Y., 1971) (prosecutor's description of injuries suffered by victim and his statement of belief

in defendant's guilt did not raise claim cognizable in federal habeas corpus); United States ex rel. Feldt v. Follette, 298 F. Supp. 1298 (S.D.N.Y., 1969) ("vigorous references" in summation did not deprive petitioner of a fair trial). See also Young v. Anderson, 513 F. 2d 969 (10th Cir., 1975) (prosecutor's statement that "I believe in my own mind and in my own heart to a moral certainty that Young is guilty" not reversible error under Donnelly v. DeChristoforo).

This Court has found harmless error in a federal court conviction where an FBI agent testified that the defendant declined to make a statement after receiving his Miranda warning even though the testimony could have violated the defendant's Fifth Amendment privilege against self-incrimination. United States v. Williams, 523 F. 2d 407 (2d Cir., 1975). A more stringent standard should not be applied to state court convictions.

Harmless error has been found by the Supreme Court of the United States and the Second Circuit even where improper statements, admissions, and even confessions were admitted into evidence. Milton v. Wainwright, 407 U.S. 371 (1972); United States ex rel. Moore v. Follette, 425 F. 2d 925 (2d Cir.), cert. den. 90 S. Ct. 2180 (1970); United States v. Duvall, 537 F. 2d 15, (2d Cir.), cert. den. 96 S. Ct. 3173 (1976); United States ex rel. Hines v. LaVallee, 521 F. 2d 1109 (2d Cir., 1975), cert. den. 96 S. Ct. 884. See also Brown v. United States, 411 U.S. 223 (1973)

(unanimous Court held introduction of illegally seized evidence harmless error because cumulative of other overwhelming and largely uncontroverted evidence); Whitely v. Warden, 401 U.S. 560 (1971) (introduction of illegally seized evidence not harmless error where only other evidence of guilt was accomplice's testimony); Harrington v. California, 395 U.S. 250 (1969) (erroneous admission into evidence of confessions of co-defendants who did not testify harmless error where defendant made statement short of confession placing him at scene and eyewitnesses placed him at scene).

In sum, it is clear that constitutional error can be "harmless" despite the alleged egregious nature of the error. All the surrounding circumstances must be considered.

The alleged errors here were several remarks by the prosecutor in a trial which totals some 4,000 transcript pages. Clearly in the light of the circumstances surrounding the remark, the proof of guilt, the curative instructions by the trial court, and in the light of the narrow standard of review set forth in Donnelly v. DeChristoforo, the petitioner's challenge must fail. Respondent's research has uncovered only one federal habeas case in the Second Circuit setting aside a state court conviction because of prosecutorial remarks in summation. That case involved racial slurs and unfavorable references to "colored people," a shocking performance besides which the alleged remarks in this

case pale in comparison. United States ex rel. Haynes v. McKendrick, 481 F. 2d 152 (2d Cir., 1973).

In reviewing the record the New York Court of Appeals twice found overwhelming proof of petitioner's guilt (Appendix, pp. 30, 45), even based solely on the circumstantial, non-testimonial evidence (see Appendix, p. 45, note 1) and that the error in the summation could not possibly have contributed to the conviction (Appendix, p. 26).

As Judge Dolling stated below, the "critically important" and convincing evidence was petitioner's own account.

Shortly after their arrival on the scene at about 9:40 a.m., a nicely groomed (291-292) petitioner began informing various police officers of what she claimed occurred over the previous twenty or so hours. Her tale contained various inconsistencies and strains credulity in several ways.

She initially told the first officer on the scene, Patrolman Clifford, that a screen which he observed lying against the wall of the Crimmins house, under the children's bedroom window, had been placed there the previous day so that it would be picked up for repair (293-295). She later informed Detective Piering that she removed the screen from the children's window sometime after 9:15 p.m. on July 13th right after she had put the children to bed. The reason that she decided to do this was be-

cause the children had been throwing their toys through a hole in the screen (485-486).

Several hours later, when Piering again questioned petitioner, he asked her about the strange fact that after she discovered that her children were missing, she paused to pick up some old clothes of her husband's that were on a chair by the front door and carried them to her automobile while she was on her way to search for the children (502-503). This occurred after she had telephoned her husband and had been assured by him that he had not taken them during the night (488). The defendant's lame explanation about picking up the old clothes "automatically" (502, 503) doesn't ring true.

Petitioner's actions, when viewed objectively, were not those of a normal mother. She herself told Detective Piering that there had been a prowler in the vicinity only two weeks prior to the disappearance of the children (578). Yet she left them alone in their room on the ground floor of her house, in the middle of the summer, completely vulnerable to intruders.

Another occurrence that took place very shortly after petitioner discovered her children missing, when she already knew that her husband had not taken them, shows that her reactions at the time were extremely unnatural. Shortly after 9:00 a.m., which was right after she had spoken to her husband (488), petitioner

was seen by her neighbor, Mrs. Judith Kay, walking from her house carrying the bundle of clothes. Although Mrs. Kay was an acquaintance and the two women passed within only 12 feet of each other, the defendant never said a word to her about her children being missing, and, in fact, never even spoke to her (892-898).

Two of the police officers, Detective Piering and Sergeant O'Connor, testified that they observed a chest of drawers in front of the partly opened window of the children's bedroom. On the chest, as well as on the window sill itself, there was a film of undisturbed dust (474-477; 687-688). Upon moving a lamp which was on the chest, Piering noted a circular dust-free spot where the lamp had stood (477). The police fingerprint man who examined the scene determined that the "outside window" of the Crimmins apartment had not been disturbed because there was a layer of dirt present on both sides of the pane and there were no fingermarks thereon (990). There were no scuff marks or other indications on the outside window sill or wall, evidencing entry through the window (996-997).

In the course of the investigation, the police propped the screen up inside the window without fastening it. They found that while the screen could be removed from the outside while in this position, to do so was quite difficult (604-605; 611-614). The evidence therefore all but precludes the possibility that the

children might have been taken out of their room through the window. As a matter of fact, it suggests strongly that someone wanted it to appear that the children were removed through the window.

Petitioner attempts to make a case for the proposition that the children were fed once more after their abduction, because of the fact that some of the foods found in the stomach of the little girl were different from what petitioner said she fed them. The only problem with this theory is that it would appear to be remarkable that some of the foods, mainly, the pasta and the green vegetable, were the same type of food as fed the child by her mother. In addition, in order for the petitioner's theory to have any weight, her word as to what she fed the children has to be accepted as gospel truth. Another factor which militates against acceptance of the surmise is the inherent unlikeliness of an abductor feeding a little girl a heavy meal very shortly before killing her. The jury was entitled to conclude that it was incredible that a little four and a half year old child, awakened in the middle of the night not long after having been fed a late supper, could again be induced to eat yet another heavy meal given to her by a stranger sometime in the middle of the night or the very early hours of the next morning.

Judge Dooling correctly concluded that petitioner's

constitutional rights were not invaded.*

POINT II

THE PROSECUTION DID NOT "SUPPRESS" ANY EVIDENCE; ASSUMING ARGUENDO THE PROSECUTION SUPPRESSED EVIDENCE, IT WAS HARMLESS ERROR.

Petitioner's claim that the prosecutor denied her a fair trial by withholding from the defense allegedly exculpatory evidence of one "Jane Roe" does not bear scrutiny.

The evidence of Jane Roe was primarily hearsay evidence contained in affidavits of defense counsel. According to this evidence, Roe was a neighbor of petitioner and threats had been made to her children, close in age to petitioner's children.** This "evidence" apparently is meant to support a theory of mistaken identity of victims by an unknown killer of petitioner's children.

The trial court denied the motion for a new trial made on this ground. The trial court ruled explicitly that Roe's testimony would not have been admissible at trial. Its opinion

* Any comment on petitioner's conversing with her counsel were, for the same reasons, harmless error, if they were error at all. See United States v. Liddy, 509 F. 2d 428 (D.C. Cir., 1974); United States ex rel. Macon v. Yeager, 476 F. 2d 613 (3rd Cir) cert. denied 414 U.S. 855 (1973).

** Petitioner nowhere has stated the ages of the Roe children. Moreover, there were four Roe children, not the two petitioner would like the court to believe. See Appendix to Petitioner's Brief to the New York Court of Appeals in 38 N Y 2d 407 (1975) p. A14.

is annexed to Petitioner's New York Court of Appeals brief in 38 N Y 2d 407, p. A101. The trial court's ruling was a discretionary ruling not subject to federal habeas review and is assumed correct. See p. 17, ante.

The Appellate Division and the State Court of Appeals affirmed. 48 A D 2d 663; 38 N Y 2d 407. The State Court of Appeals wrote:

"The affidavit of the other deponent was insufficient to ground an inference of improper suppression of evidence by the prosecution. Perhaps most important it does not contain relevant or competent evidence on the issue of guilt or innocence, but at best supplies clues arguably meriting investigation. The defendant has now had for some time opportunity, through unusually adept lawyers, to make such an investigation. There is still nothing beyond a remote speculative inference to offset what may be a strange coincidence involving two other little children, crediting the affidavit without qualification. The issue was not the truth and accuracy of the affidavit but whether one could say that there had been an improper suppression by the police rather than a reasonable exercise of judgment. This issue was determinable from the papers. There is no disagreement in the court concerning this branch of defendant's motion.

It is true that the road to justice in this 10-year-old case has been long. Much too long indeed, on any view. Its length should not be further extended, however, by proffered 'newly-discovered' evidence, baseless and weightless, nor should it be extended by erroneous, however dextrous, misapplication of this Court's limited power to review and viola-

tion of time-tested and accepted grounds for ordering new trials in criminal actions. The road to justice, short or long, should be the road to justice, and not a primrose path." (Appendix, p. 53)

The conclusions of the state courts were correct. The evidence of Jane Roe, based on hearsay threats and sheer speculation as to mistaken identity of the murder victims, was not relevant or competent evidence on the issue of petitioner's guilt. Even defense counsel admitted, in an affidavit submitted on the motion to the trial court:

"We have no way of knowing, nor do we claim, nor do we disavow, that the Sierra episode, threats, etc., had anything to do necessarily with the Crimmins' case." (Petitioner's Appendix to New York Court of Appeals Brief, 38 N Y 2d 407, p. A24.)

Some of the factual assertions made on this point in the petition deserve careful scrutiny. Although Jane Roe swore in an affidavit that she was not told she could go to defense counsel and that the district attorneys office told her the matter was "checked out" and to forget about it, the prosecutor's office contradicted this on the motion in the affidavit of assistant district attorney Vincent F. Nicolosi, who asserted that assistant district attorney DeMakos told Roe in the presence of Assemblyman Gold that she was free to go see defense counsel and tell them about her theories. (Appendix to Petitioner's New York Court of Appeals Brief, pp. A53, 81.)

Most important, in his opinion, Judge Balbach states that he told Roe's intermediary to go see the District Attorney and defense counsel as she might be advised, and that he did not know the content of Jane Roe's disclosures. (Petitioner's New York Court of Appeals Appendix, p.A103.)

Assemblyman Gold confirms this version in his signed "notes" with the following remarks:

"... Judge Balbach stated the availability of the District Attorney as well as defense counsel, and in no way impeded [Jane Roe] or myself from discussing the matter with Mr. Lyon. The decision not to see Lyon was strictly [Jane Roe's]."

Further, Mr. Gold in his "Notes" also stated:

"The fact is that [Jane Roe] was told by Mr. DeMakos and Detective Piering that the matter had been checked out and that they were satisfied that the information was irrelevant and that Mrs. Crimmins was being tried on the basis of the evidence against her. However, it was made perfectly clear by Mr. DeMakos, Detective Piering and me that [Jane Roe] was free to talk to Mr. Lyon if she felt so inclined. It was [Jane Roe] who said forget about it, as she was apparently no longer interested in pursuing the matter. Outside of the Court [Jane Roe] told me that she was not satisfied that the matter had been checked out whereupon I offered to walk her back into the Court to meet with Mr. Lyon and she refused and said she would forget about it."*

* Petitioner's trial attorneys stated that the trial judge was told about Roe. See Petitioner's New York Court of Appeals Appendix, pp. A20, 21, 28, 40-41.

Since the "evidence" of Jane Roe was speculative, not probative of petitioner's guilt, and not exculpatory, there was no violation of Brady v. Maryland, 373 U.S. 83 (1963), which requires for "suppression" to occur the withholding of evidence both favorable to the accused and material to the issue of guilt.

Moore v. Illinois, 408 U.S. 786 (1972), is instructive here. In Moore evidence was not disclosed by the prosecution. That evidence consisted of a pretrial statement by one individual to the effect that the accused was known as "Slick" and documents that established that the accused was not the person known to others as "Slick." The Supreme Court found no Brady violation, finding the allegedly "suppressed" evidence related only to the misidentification of "Slick" rather than the identity of the accused as the person who made particular incriminating statements. The identical principle is controlling here.

It should be noted that defense counsel learned of Jane Roe's disclosures in June, 1971. A motion for a new trial was not made on this ground until a year later.

It should be further noted that the motion for a new trial was made on two grounds: (1) newly discovered evidence (the "Macklem" affidavit)* and (2) the "suppression" of Jane Roe's disclosures. The two grounds of this motion were completely incon-

* Petitioner has not pursued this claim to this Court, although she did argue it in the court below.

sistent as they embrace conflicting theories as to what happened on the fateful night in question, as petitioner candidly admits. Petition, par. 14Q.

The essence of petitioner's claim is not really suppression; but rather newly-discovered evidence. However, whether newly-discovered evidence should require a new trial is a question of discretion for the trial court and is not subject to federal habeas review. See p. 17, ante.

Significantly, petitioner makes no showing or claim that if a new trial were held today she would have positive, probative, admissible evidence (based on an investigation of Jane Roe's disclosures) to offer on the question of petitioner's guilt. There has been plenty of time now to investigate Jane Roe's story; there is no claim that what was complete conjecture and speculation in 1971 is any less conjecture or speculation in 1977.

At most, the "evidence" of Jane Roe was a clue for investigation, as the State Court of Appeals pointed out. 381 N.Y.S. 2d at 10. However, as the Supreme Court noted in Moore (at 795):

"We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."

It appears that investigation by the Queens District

Attorney proved nothing. Assemblyman Gold said in his statement:

"The fact is that [Jane Roe] was told by Mr. DeMakos and Detective Piering that the matter had been checked out and that they were satisfied that the information was irrelevant and that Mrs. Crimmins was being tried on the basis of evidence against her."

If this uncontradicted statement is true, there is no possibility of suppression of "exculpatory evidence." Petitioner suggests the clue was never "checked out" because not a single police report during or prior to the second trial covered Jane Roe's story (Petition, par. 14L); however, the alleged absence of any pretrial reports on Jane Roe's story is understandable in view of petitioner's admission that Jane Roe's story came to the attention of the District Attorney during the trial (Petition, par. 14A).

The Court, in United States v. Agurs, 427 U.S. 97 (1976) has set forth the standard by which to judge Brady claims. The Court in Agurs stated that Brady arguably applies in three different situations.

First, where a conviction is obtained by a knowing use of perjured testimony, it must be set aside if there is any likelihood that it affected the judgment of jury. Even petitioner does not claim that there was such a possibility here.

Second, where there was a suppression after a pretrial request for specific material, a new trial will be ordered only if

the evidence was material, i.e., it might have affected the outcome.

Specific means that a particular item of evidence or information was requested, e.g., a named witness' story, a set of fingerprints. The Court did not mean, as petitioner suggests, that contradictory or exculpatory material was specifically asked for. In no way can petitioner's request be considered a specific request for the Jane Roe information.

Petitioner herself admitted that myriad stories, hypotheses, letters and theories plagued them during, before and after the trial. See, petitioner's New York Court of Appeals Appendix, p. A28. Surely the same happened to the prosecutor. Petitioner's request for any contradictory material was not a request for specific material.

In any event, even where a specific request is made, the Court, under Agurs, permits the prosecutor to either furnish the material to the defense or submit the problem to the judge. 427 U.S. at 106. The trial judge here was apprised of the problem and solved it in a proper way, by telling Doe's intermediary to speak to the defense. Surely, the judge was not then required to supervise the actions of third parties.

Third, under Agurs, as happened here, is what should happen when the defense asks for all exculpatory material or makes

no request at all. The problem is judged under a general due process standard:

"But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 427 U.S. at 108.

"If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." 427 U.S. at 109.

This the constitution does not require. Nor does the constitution require that the prosecutor make:

"'a complete and detailed accounting to the defense of all police investigatory work on a case' Moore v. Illinois, 408 U.S. 786, 795 (fn. omitted). The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109.

The defendant has a higher burden than the usual constitutional harmless error test.

This Court has held that Agurs requires a new more exacting standard for the granting of a new trial: "in the context of the entire record, the omitted evidence must raise a reasonable doubt as to the defendant's guilt." United States v. Stassi, 544 F. 2d 579 (2d Cir., 1976), cert. den. 97 S. Ct.

1176, 1177 (1977).

As stated in Brach v. United States, 542 F. 2d 46 (2d Cir., 1976):

"There is no doubt that the thrust of the Agurs majority view is that the unqualified finding of the trial judge that the respondent was indeed guilty was enough to defeat the motion for a new trial."

The trial judge here found that the evidence was immaterial and inadmissible. The New York Court of Appeals twice found overwhelming evidence of guilt. The court below found no error. The Doe information created no reasonable doubt of petitioner's guilt, and a new trial would not be warranted.

POINT III

THE MURDER INDICTMENT INFLICTED
NO UNCONSTITUTIONAL PENALTY ON
PETITIONER; IN ANY EVENT THE
QUESTION IS ACADEMIC.

Petitioner claims that the murder indictment as to the death of her son constituted an unconstitutional penalty in violation of the due process and double jeopardy clauses. This claim is without merit.

The claim is, at the outset, academic. Petitioner's conviction for murder was set aside by the Appellate Division, 41 A D 2d 933 (2d Dept., 1973), an action affirmed by the State

Court of Appeals (36 N Y 2d 230). Accordingly, assuming arguendo the murder indictment was a "penalty," that "penalty" has been lifted and eliminated.

Nowhere in petitioner's petition did she claim that she was prejudiced in any way by this "penalty" insofar as the manslaughter conviction is concerned. Petitioner did make the obvious statement that "(t)he trial jury at the second trial considered both charges," but this in itself proves nothing. Juries often consider multiple charges against a defendant.

Price v. Georgia, 398 U.S. 323 (1970) does not support the proposition that petitioner was prejudiced by the retrial on both charges. There the prisoner had been charged with murder and convicted of manslaughter as to one crime. The conviction was reversed on appeal. On retrial the defendant was again tried for murder and again convicted of manslaughter for the same crime. It was held that double jeopardy barred the second trial on murder charges and was not harmless error despite the ultimate conviction for mere manslaughter, since it could not be said that the murder charge did not induce the jury to find the accused guilty of the lesser charge of manslaughter rather than continue to debate the issue of innocence.

The heart of the matter is that here, unlike the case in Price, two separate crimes are involved, not just one. This

difference is crucial. The simple truth is that petitioner was never put in double jeopardy at any time for the same crime.

Petitioner apparently asserts prejudice because the deaths of the two children were allegedly parts of "the same criminal episode," citing United States v. Marion, 404 U.S. 307 (1971), n. 12. A person charged with the homicide of two individuals can hardly be said to be answerable only for a single "criminal episode," even though in petitioner's view the homicides may have occurred as part of a single criminal "transaction." The homicide of any single person is a separate legal event in the eyes of the law. The fact that two alleged crimes may be part of a single criminal "episode" may be a valid reason for denying a severance, as it was here, but it does not mean that indictments for the crimes must be handed down contemporaneously or somehow "merge" for double jeopardy and due process purposes.

Petitioner places her principle reliance on the Supreme Court's recent decision in Blackledge v. Perry, 417 U.S. 21 (1974). Blackledge is irrelevant to this case. There the accused had been convicted of a misdemeanor in a trial court and had appealed to a higher court. Under North Carolina law, the defendant had an absolute right to a trial de novo in that higher court. Prior to the trial de novo, however, the prosecutor obtained a grand jury indictment charging a felony for the same conduct for which the

defendant had been convicted of a misdemeanor. The defendant was convicted upon the indictment. The Court held that this violated due process of law on the theory that a person convicted of an offense at the trial court level was entitled to pursue his statutory right to a trial de novo at the higher level without apprehension that the State would retaliate by substituting a more serious charge for the original one.

The murder indictment herein deprived petitioner of nothing to which she was entitled, as did the felony indictment the accused in Blackledge. Petitioner had no right to assume that she was somehow immune from an indictment for the murder of her son, or that a murder indictment had somehow been waived. Certainly no appellate remedy had been impaired, as it was in Blackledge, since the appellate process after the first trial had already been completed. Petitioner was deprived of no statutory entitlement, as was the accused in Blackledge. Cf. United States ex rel. Jackson v. Follette, 462 F. 2d 1041 (2d Cir., 1972).

Nor does North Carolina v. Pearce, 395 U.S. 711 (1969) require a different result. North Carolina v. Pearce, supra, requires that a court not impose for vindictive purposes a more severe sentence upon retrial and reconviction after a defendant has successfully appealed. If the court does so, it must state its reasons. United States v. Ricard, ___ F. 2d. ___, Slip Op.

No. 1282, p. 6015, Dock. #77-1109 (2d Cir., Sept. 16, 1977).

Where the prosecutor can justify the increased charges brought against a defendant and where the defendant has no substantial evidence of vindictiveness on the part of the prosecutor, the increased charges do not violate the defendant's due process rights. United States v. Ricard, supra.

Only in petitioner's imagination did the District Attorney concede the indictment was vindictive. Only in her imagination did the prosecutor recognize from the outset that there was no corpus delecti.

The District Attorney provided the reason for the delay in the indictment. In his Reply Brief to the New York Court of Appeals, dated December, 1974, pp. 36-37, the District Attorney stated:

"The indictment and conviction of respondent for the killing of her daughter obviously did not in any way preclude a subsequent prosecution for the murder of her son; particularly since, prior to Joseph Rorech's testimony concerning her confession, given for the first time during respondent's first trial, it did not appear that the prosecution had a prima facie case with regard to the boy's death. After Rorech's testimony at the first trial, the situation changed dramatically.

"Armed with new and additional evidence of respondent's guilt, the prosecution was equipped to proceed with its case on the homi-

cide of respondent's son. The case was not presented to a grand jury immediately after respondent's first trial because of practical considerations with regard to respondent's appeal of her first conviction. To be sure, if the prosecution had sought to immediately indict and seek a trial on the boy's homicide, defense counsel would have argued that the prosecution was persecuting respondent and was using the extensive resources of its office to bury respondent's counsel in litigation. Moreover, notwithstanding the difference between the two homicides, they were sufficiently connected to mandate their being tied together. [People ex rel. Pincus v. Adams, 274 N.Y. 447 (1937); People v. Virga, 285 N.Y. 725 (1941); People v. Bussey, 297 N.Y. 627 (1947); People v. Jack, 8 N Y 2d 857 (1960); People v. Colligian, 9 N Y 2d 900 (1961); People v. Hetherington, 27 N Y 2d 242 (1970).] The prosecution therefore took the only logical course open to it, and delayed the submission of the boy's case until respondent's first appeals were decided. Parenthetically, respondent's challenge on appeal to the sufficiency of the evidence of her guilt furnished another practical reason for awaiting the outcome of appellate review.

"It is submitted that the circumstances described above constitute a "valid explanation" for the forbearance of the prosecution to proceed with the boy's case. See People v. Townsend, 38 A D 2d 569 (2d Dept., 1971)."

That the District Attorney had a reasonable argument that there was a corpus delicti is demonstrated by Point Four of his New York Court of Appeals Brief dated April, 1974, pp. 67-74. At page 73, it was argued:

"There appears to be no quarrel with the State of the law in this area. The corpus delicti

in a homicide can be established by directly proving that the victim died, and by circumstantially proving that the accused caused the victim's death. Roloff v. People, 18 N.Y. 179 (1858); People v. Bennett, 49 N.Y. 143 (1872); People v. Palmer, 1109 N.Y. 110 (1888); People v. Berham, 160 N.Y. 423 (1899)."

See also Point Nine of District Attorney's Appellate Division Brief, dated January, 1973, pp. 121-123.

The justification for the delay is apparent. Petitioner has no evidence of vindictiveness.

Nor can petitioner demonstrate that the pre-indictment delay violated her due process rights. There was no substantial prejudice to her ability to present her case at trial. No witnesses disappeared or forgot any details.* Nor was the delay intentional. The delay thus did not violate petitioner's due process rights. See United States v. Marion, 404 U.S. 307 (1971); United States v. Vispi, 545 F. 2d 328 (2d Cir., 1976); United States v. Eucker, 532 F. 2d 249 (2d Cir., 1976).

The District Court properly found that petitioner's due process right was not violated since "there was no prejudice at trial other than that which inevitably but lawfully arose from trying together two charges which arose out of the same set of facts. See, Ciucci v. Illinois, [356 U.S. 571 (1958)]; Hoag v. New Jersey, [356 U.S. 464 (1958)]; cf. United States ex rel. Jackson v. Follette, 2d Cir. 1972, 462 F. 2d 1041, 1049-1050."

* Indeed, petitioner simultaneously claims that the Roe material was important to her case. That material did not develop for six years after the deaths of petitioner's children.

POINT IV

PETITIONER WAS NOT DEPRIVED OF
A FAIR TRIAL BY THE PROSECUTOR'S
ALLEGED DEMONSTRATION THAT PETI-
TIONER'S ACCOMPLICE, A DEFENSE
WITNESS, HAD EXERCISED HIS FIFTH
AMENDMENT RIGHTS

Petitioner's claim that she was deprived of a fair trial because the prosecutor brought out that her alleged accomplice, a defense witness at trial, had previously invoked the Fifth Amendment by refusing to answer questions in the investigation into the deaths of Crimmins' children, is without merit.

The Appellate Division found that the prosecutor committed error in this respect, 41 A D 2d 933 (2d Dept., 1973). The State Court of Appeals assumed arguendo the Appellate Division was correct but did not reach the issue. Instead, the State Court of Appeals found that any assumed error was harmless non-constitutional error. 36 N Y 2d 230, 238.

Petitioner is incorrect in stating that evidence that a witness invoked his constitutional privilege is inadmissible. Indeed, as the District Court correctly noted:

"Grunewald v. United States, 1957, 353 U.S. 391, 416-421, is clear that where a witness - in that case a defendant - has waived his privilege against self-incrimination by testifying, he may be impeached by showing prior inconsistent statements, and that in some circumstances refusing to testify (or, semble, refusing to waive immunity) can amount

to a prior inconsistent statement. The Court held it was error to permit the evidence in Grunewald because the question asked - and which the defendant declined to answer - would have produced evidence linking the defendant, whether he was guilty or innocent, to a co-defendant; the refusal to answer, therefore, amounted only to saying he would not furnish evidence to support a charge which he had testified was groundless. Cf. United States v. Glasser, 2d Cir. 1971, 443 F. 2d 994, 1004-1006."

Indeed, by citing the Sing Kee case (United States v. Sing Kee, 250 F. 2d 236 [2d Cir. 1957], cert. den. sub. nom. Sing Kee v. United States, 355 U.S. 954), petitioner must recognize that under the law of this Circuit such evidence may or may not be admissible depending on the circumstances of the particular case.*

* Even as to a defendant, the admission in evidence of an exercise of a Fifth Amendment privilege or statements taken in violation of the privilege is not necessarily inadmissible. Harris v. New York 401 U.S. 222 (1971). The Supreme Court in United States v. Hale, 422 U.S. 171 (1975) failed to reach the constitutional issue as to the propriety of the use of a defendant's constitutionally protected silence for impeachment purposes. The Court held in that case that the probative value of the evidence of silence was less than the possible prejudice to the defendant and held the admission of the evidence improper solely on the strength of the Supreme Court's supervisory powers over the federal courts. See also United States v. Zouras, 497 F. 2d 1115 (7th Cir. 1974) (no error in the prosecution's impeachment of a witness by showing she had remained silent when questioned by the District Attorney; held that the defendant had no stake in the witness' Fifth Amendment privilege).

In Sing Kee the test as to the admissibility of a witness' exercise of the Fifth Amendment privilege is whether the jury would be likely to equate the exercise of the witness' privilege with the defendant's guilt (Sing Kee at 240, emphasis added). A balancing process is required which balances the effect on credibility and the possible impact on the jury's belief in the defendant's guilt or innocence.

Applying this balancing test, there was no error. The testimony regarding Colabella's exercise of the "Fifth Amendment privilege" was vague in the extreme.

The Fifth Amendment was never mentioned by name. There was only testimony about papers called "waivers of immunity" in connection with a grand jury. The "grand jury" was not even specified as one investigating the deaths of petitioner's children. Colabella testified that he was not even sure that he was brought up to be brought before a grand jury and he said he was never told that before he went in to testify he would have to sign waivers of immunity (2731). He testified that he was not told what the pieces of paper were and that he did not know what a waiver of immunity was (2729). At no time did Colabella say specifically that he refused to sign or did not cooperate with the grand jury.

In light of the above, it must be noted that the prosecution made only one significant reference to Colabella in its own direct case, when Rorech testified that petitioner had identified a picture of Colabella as "the man who was with me that night" (1582). The question of whether petitioner accurately or inaccurately inculpated Colabella is of no relevance to the issue of her own guilt. Conversely, petitioner's statement was probative of her own guilt because it was an admission that she was with someone, thus directly contradicting her explanations to the police and partially corroborating the testimony of Earomirski.

Assuming arguendo there was error in the admission in evidence of Colabella's alleged exercise of his privilege, it is submitted that the error was harmless. There was overwhelming proof of defendant's guilt, and the error was harmless under the harmless non-constitutional error test set forth by the majority's opinion in 36 N Y 2d 230. This Court, as well as the District Court, has properly indicated that any such error is trial error, not constitutional error. United States v. Natale, 526 F. 2d 1160 (2d Cir., 1975) cert. denied 425 U.S. 950 (1976). State and not federal law applies.

In its majority opinion, the State Court of Appeals, Jones, J., set forth a definitive statement of New York law of

harmless non-constitutional error. The Court noted that this statement involved "peculiarly questions of the law of the State of New York to be determined by our State courts' and was different then the federal rule as to harmless constitutional error. 36 N Y 2d 230, 239.

Clearly, the Principles of Federal Habeas Review, "E", which holds that state law is for state courts, is applicable here. p. 16 ante. In its last opinion in this case the State Court of Appeals noted that its rule had been law in New York for more than a century. 381 N.Y.S. 2d at 5. The opinion obviously represented a major attempt by New York's highest court to clarify and streamline harmless error analysis for the benefit and guidance of all lower New York courts. The opinion is clearly the product of much thought and reason.

The real issue confronting any appellate court is said to be how much prejudice the error has caused, not whether the error is a "constitutional" error.

It is respectfully submitted that it is not the function of this Court to "adopt" evidentiary rules and impose them on the state courts simply because it may consider them "sound" and simply "because it may consider existing rules "unsound". Indeed, this is beyond this Court's jurisdiction. It would be especially inappropriate in this case in view of the majority's delineation of a thorough and workable rule.

First, the majority opinion did in fact consider the problem of the prejudice caused by non-constitutional error. Indeed, prejudice is heart of the New York harmless non-constitutional error test, namely whether, in the face of overwhelming proof of guilt, there was a significant probability of an acquittal despite the error. If so, reversal is required.

Second, the majority rule requires that a trial be fundamentally fair irrespective of whether an error contributed to conviction and irrespective of the weight of the evidence.

Third, petitioner's attempt to do away with the distinction between non-constitutional error and constitutional error simply proves too much. Such an argument reduces the Constitution of the United States from our primary organic source of law to a mere rule book of evidence. Prejudice must have a frame of reference; it cannot be analyzed in the abstract. Prejudice is the loss of rights; some rights are more sacred than others, and prejudice must be scaled accordingly. The simple fact is that some errors are "constitutional" errors and some are not. This has always been the case. No court has ever held otherwise. Indeed, the entire system of federal habeas review presumes as much, since that system canvasses only for fundamental constitutional error.

The majority opinion indicated that it would review the record on its own in making its determination. The doctrine that the

State must prove beyond a reasonable doubt that is harmless is a doctrine specifically limited to constitutional error. Chapman v. California, 386 U.S. 18, 21-24 (1967). It has never been held that the State must prove any error harmless beyond a reasonable doubt.

In assessing the impact of the alleged error, it must again be noted that testimony regarding the alleged refusal to sign waivers of immunity was vague in the extreme. That a lay jury would equate this testimony with "pleading the Fifth Amendment" is doubtful. The United States Court of Appeals for the Second Circuit has pointed this out in a recent case, also assessing the impact of an alleged Sing Kee error, United States v. Natale, supra at 1172:

"it is postulating far too great a sophistication on the part of the jurors to conclude that, from the fact that immunity was provided to Lapin before the grand jury, they drew the inference that he had exercised his Fifth Amendment privilege to refuse to testify there. The fact that immunity is proved does not always imply that a Fifth Amendment refusal to testify has first occurred. For example, under the New York Criminal Procedure Law § 190.40 (McKinney 1967) all witnesses are granted immunity automatically by reason of their appearance before the grand jury unless the immunity is specifically waived. It would be wholly speculative to attribute to these lay jurors an understanding of the reference to immunity

en passant as anything more than
a description of the grand jury
procedure."

As in Natale, the reference to the constitutional
privilege in this case was "neither direct nor clear". Natale,
at 1172. Clearly, petitioner reads too much significance into
this claim. The District Court properly found that "no damaging
consequence ... followed".

CONCLUSION

THE ORDER OF THE DISTRICT
COURT DISMISSING THE PETITION
SHOULD BE AFFIRMED IN ALL
RESPECTS.

Dated: New York, New York
October 7, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

David C. Buell, being duly sworn, deposes and
says that he is employed in the office of the Attorney
General of the State of New York, attorney for Respondents
herein. On the 11th day of October, 1977, he served
the annexed upon the following named person :

Roderick Soloff
Professor
Hofstra University School of Law
Hempstead, New York 11550

Attorney in the within entitled apparel by depositing
3 a true and correct copy^{ies} thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by her for that
purpose.

Sworn to before me this
11th day of October, 1977
Richard J. [Signature]

Assistant Attorney General
of the State of New York

David T. Buell